APPENDIX A

Statute Involved

Section 14 of the Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 5 U.S.C. 851 et seq.:

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to

his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

Regulations Involved

Regulation 20-705, as it was in effect prior to January 30, 1959:

This regulation prior to January 30, 1959, varied with the regulation as is reflected in the brief of the defendant below (R. 32-33) in that it covered General Separation Actions and reflected that it would apply to separations for unsatisfactory performance under the heading of Actions based on conduct or qualifications. In addition to the foregoing, the said regulations further provided that employees entitled to the protection of the Veterans' Preference Act would be accorded the same even though they had not completed a year of employment.

* * * * * * * * * * *

Section 21.10 Part 21 Chapter Z1 of the Federal Personnel Manual:

SEC. 21.10 Removal, suspension, furlough, or demotion of preference employees. This section shall apply to permanent and indefinite employees entitled to five- or ten-point preference under the regulations in this part but shall not apply to (a) employees during their first year of current continuous Federal or District of Columbia service, (b) employees appointed for periods specifically limited to one year or less, or (c) employees whose annuity under the Civil Service Retirement Act, as amended, was continued upon reemployment in an appointive position on or after October 1, 1956.

Any employee subject to this section who is proposed for involuntary discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation, shall have at least thirty days advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action. Such employee shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting. Such appeal shall be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such employee shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with rules and regulations of the Commission. After investigation and consideration of the evidence submitted, the Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or his designated representative, and if the findings and recommendations are favorable to the employee, it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Commission may declare any such employee who may have been dismissed or furloughed without pay to be eligible for entry of his name on the agency reemployment list established under section 21.6 (b).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 341-60
(Decided January 12, 1962)

GEORGE S. RHODES

v.

THE UNITED STATES

John P. Witsil for plaintiff.

Edward J. Reis, with whom was *Assistant Attorney General William H. Orrick, Jr.*, for defendant.

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

This is an action by plaintiff to recover damages for an alleged wrongful termination of employment by the Central Intelligence Agency.

Plaintiff alleges that he was terminated in violation of the Veterans' Preference Act of 1944, as amended, 5 U.S.C. 851 *et seq.*, the regulations of the Civil Service Commission and of the Central Intelligence Agency.

Defendant contends that plaintiff's termination was pursuant to the authority granted the Director of the Central Intelligence Agency by section 102(c) of the National Security Act of 1947, 61 Stat. 495, 498, and as set forth in Regulation 20-740.

The case arises on cross-motions for summary judgment and presents two questions: (1) whether the Director of

the Central Intelligence Agency had discretion to terminate plaintiff's employment with the Agency when the Director deemed such termination either necessary or advisable in the interests of the United States, and (2) whether the agency violated its own regulation in terminating plaintiff's employment.

The facts are summarized as follows: Plaintiff was employed by the Central Intelligence Agency as a Document Analyst, Grade GS-12, at an annual salary of $8,570, prior to his dismissal on March 16, 1959. His position was a secretive one and its description is classified. This is made evident by the oath taken by plaintiff as an incident to employment to the effect that he would never divulge or reveal any classified information, or intelligence, or the methods of collecting and handling such information or intelligence. He further agreed that no change of assignment or employment would ever relieve him of such obligation.

On February 10, 1959, the Director of the Central Intelligence Agency determined that termination of plaintiff's employment was necessary and advisable in the interests of the United States. The Director then, exercising his discretion under the authority granted by section 102(c) of the National Security Act of 1947, *supra*, terminated plaintiff's employment.

Plaintiff thereafter sought to appeal this termination of employment to the Civil Service Commission. An appeals examiner of the Civil Service Commission determined that plaintiff was separated from his position in the Central Intelligence Agency pursuant to section 102(c), *supra*, and determined that the Director of the Central Intelligence Agency could terminate the employment of an employee of the Agency whenever he deemed it to be in the in the interests of the United States, notwithstanding the provisions of the Civil Service Act, the Veterans' Preference Act or the provisions of any other law. The examining officer further stated that plaintiff's contentions, *supra*, concerning

the Central Intelligence Agency's failure to follow its own regulations were not within the jurisdiction of the Civil Service Commission and were, therefore, referred to the Central Intelligence Agency for whatever action it deemed appropriate.

The decision of the appeals examining officer was then appealed to the Board of Appeals and Review of the Civil Service Commission which, on June 26, 1959, after reviewing the case, again stated that neither the Civil Service Act, nor the Veterans' Preference Act, nor any other law, is applicable to termination of employment under the authority of section 102(c) of the National Security Act, *supra*. The decision of the appeals examining officer was affirmed.

On June 2, 1959, as a result of plaintiff's allegations that the Agency had failed to follow its own regulations in terminating plaintiff's employment, the General Counsel of the Central Intelligence Agency wrote plaintiff stating that the only administrative regulation of the Agency, applicable to termination of employment under section 102(c), was Regulation 20-740.

Later, on July 9, 1950, the Agency further informed plaintiff that the Agency found no basis for plaintiff's allegation that it had failed to follow its own regulations.

This suit result, and claim is made by the plaintiff that he first learned of the possibility of his being dismissed in November of 1958 and that no mention of his dismissal pursuant to section 102(c), *supra*, was made until February 13, 1959. Plaintiff further contends that he was led to believe that he was to be dismissed pursuant to the "selection out" program of the Agency, procedures for which were provided for within the Agency (Regulation 20-705).

Plaintiff then alleges and contends that he was not given the protection of those procedures although he requested the same.

Regulation 20-705, dated January 30, 1959, reads as follows:

1. GENERAL

a. This regulation states the requirements and procedures applicable to certain separation actions. This regulation governs the separation of Agency employees for all reasons except reduction in force, entry into military service, separation based on adverse findings of a security hearing board, and termination by the Director under the authority granted him by section 102(*c*) of the National Security Act of 1947 (61 Stat. 495, 50 U.S.C. 401, P.L. 253, 80th Congress, first session), as amended, and as set forth in Regulation No. 20-740.[1]

It is noted that the above Regulation specifically provides that it is not applicable to termination under section 102(*c*) of the National Security Act, *supra*.

Regulation 20-740, dated November 1, 1954, under which defendant contends that plaintiff's employment was terminated, reads as follows:

1. STATUTORY POWERS OF THE DIRECTOR OF CENTRAL INTELLIGENCE

The Director of Central Intelligence is empowered to terminate the employment of any officer or employee of the Agency whenever he deems such action necessary or advisable in the interests of the United States. Termination action under this authority, quoted below, is within the sole discretion of the Director of Central Intelligence, and no appeals procedure is provided for by law.

[1] Plaintiff seems to say that Regulation 20-705 contained something different from the quoted regulation at the time of his termination. His petition and brief are silent on this point and contain no citation or copy of any other regulation.

"Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

2. EMPLOYMENT REVIEW BOARD

The Director may appoint an Employment Review Board to advise him concerning any particular case.

* * * * *

Cases are legion holding that the Government, as an employer, has the right to terminate the employment of any of its employees at any time, providing there is no statute or regulation limiting this right. *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed 341 U.S. 918; *Kent* v. *United States*, 105 Ct. Cl. 280.

In the instant case, we can find no regulation that was violated. All the exhibits, together with the affidavits of the Director of the Central Intelligence Agency, disclosed that plaintiff's employment was terminated pursuant to section 102(c), *supra*, and Regulation 20-740 thereunder, and clearly this statute and regulation gave the Director of the Central Intelligence Agency the absolute right to terminate any employee whenever he deemed it necessary or advisable. Under these circumstances the Agency was within its rights when it terminated plaintiff's employment, and the Civil Service Commission correctly declined to overturn the decision of the appeals examining officer.

Moreover, even if, as plaintiff alleges, the original bases for dismissal were under something different from section

102(c), certainly the final action was under section 102(c), and we know of no provision of law or regulation that would prevent the Agency Director from changing the character of dismissal. As a matter of fact, there is precedent for permitting a change in its method of procedure before plaintiff's employment was terminated. *Atkinson* v. *United States*, 144 Ct. Cl. 585; *Hoppe* v. *United States*, 136 Ct. Cl. 559, cert. denied 355 U.S. 816; *Misuraca* v. *United States*, 135 Ct. Cl. 387; *DeBusk* v. *United States*, 132 Ct. Cl. 790, cert. denied 350 U.S. 988; *Thomas* v. *Ward*, 225 F. 2d 953, cert. denied 350 U.S. 958. However, we do not think the Director did deviate from the original path. At all times, the only regulation which applied under section 102(c) was the quoted Regulation 20-740 that contained a copy of section 102(c), *supra*, and this is the only regulation relied on by the Director.

It is true that the Executive Officer of the Office of Personnel of the Central Intelligence Agency did fully explain to plaintiff the reasons for proposed dismissal and invite him to reply to same. However, there was no regulation requiring such action. This was purely a voluntary act and in no sense could give rise to a contention that because he did this some other course should have been taken which embraced some regulation other than that under which plaintiff was dismissed. Furthermore, the Executive Officer specifically stated in his memorandum to plaintiff that final action would be taken by the Director pursuant to the National Security Act, *supra*, and the memorandum further stated that Regulation 20-740, *supra*, was the only regulation specifically concerned in a case of this sort.

The fact that plaintiff was given the opportunity to accept a lesser job does not affect the procedures above outlined. Plaintiff's brief contains a statement to the effect that plaintiff's employment as a Grade GS-12 was not in the interests of the United States, but that his employment as a Grade GS-9 was in the interests of the United States. In this

respect, we can think of many reasons why plaintiff's employment as a Grade GS-9 could be in the interests of the United States, while employment as a Grade GS-12 would not be. We do not know, because of the necessary secrecy involved, what duties are attached to the various grades within the Agency. We do know, however, from human experience that the higher the office the greater the responsibilities and consequent security aspects. In the light of this, we can find no fault with the statute and regulation which gave plaintiff the right, if declared eligible, to accept employment in any other department or agency of the Government, and by the same token gave the Agency authority to offer a lesser position.

For the reasons stated above, we hold that no regulation of the Central Intelligence Agency was violated when plaintiff's employment was terminated and, consequently, the action of the Civil Service Commission could not be arbitrary, capricious or contrary to law. Since all pertinent regulations were followed, the Supreme Court's decision in the case of *Service* v. *Dulles*, 354 U.S. 363, and this court's decision in *Watson* v. *United States*, 142 Ct. Cl. 749, are inapplicable.

Defendant's motion for summary judgment is granted, and plaintiff's cross-motion is denied. Plaintiff's petition will be dismissed.

It is so ordered.

Reed, *Justice* (*Ret.*), sitting by designation; Durfee, *Judge*, and Jones, *Chief Judge*, concur.